

**Office Action Summary****Application No.**

09/769,076

**Applicant(s)**

KRYSIK ET AL.

**Examiner**

ANDREA VALENTI

**Art Unit**

3643

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --  
**Period for Reply**

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**Status**

- 1) ☒ Responsive to communication(s) filed on 09 January 2012.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ An election was made by the applicant in response to a restriction requirement set forth during the interview on \_\_\_\_; the restriction requirement and election have been incorporated into this action.
- 4) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

**Disposition of Claims**

- 5) ☒ Claim(s) 1-6,9-13,15,17-22,25,36,37,39-42,45,46,48,49,51,53 and 56-70 is/are pending in the application.
- 5a) Of the above claim(s) See Continuation Sheet is/are withdrawn from consideration.
- 6) ☐ Claim(s) \_\_\_\_ is/are allowed.
- 7) ☒ Claim(s) 56-70 is/are rejected.
- 8) ☐ Claim(s) \_\_\_\_ is/are objected to.
- 9) ☐ Claim(s) \_\_\_\_ are subject to restriction and/or election requirement.

**Application Papers**

- 10) ☐ The specification is objected to by the Examiner.
- 11) ☐ The drawing(s) filed on \_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 12) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

**Priority under 35 U.S.C. § 119**

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
  2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_.
  3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

**Attachment(s)**

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO-893)
- Paper No(s)/Mail Date \_\_\_\_

- 4) ☒ Interview Summary (PTO-413)
- Paper No(s)/Mail Date \_\_\_\_
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: \_\_\_\_

Continuation of Disposition of Claims: Claims withdrawn from consideration are 1-6,9-13,15,17-22,25,36,37,39-42,45,46,48,49,51 and 53.

## DETAILED ACTION

### ***Claim Rejections - 35 USC § 103***

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 56-70 are rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,076,299 to Spittle et al in view of U.S. Patent No. 6,058,647 to Emalfarb and U.S. Patent No. 5,235,781 to Holley.

Regarding Claims 56, 61, 62, 70, Spittle teaches a method of determining moisture content of soil and/or seed comprising: placing mulch product on soil said soil containing seed(s) (Spittle Col.1 line 30); said color coming from a pigment and/or dye in said mulch product (Spittle teaches a natural pigment via the addition of "clay" Col. 1 line 57; also teaches the possible addition of a dye Col. 2 line 40); said mulch product comprising a fiber, cellulose, clay, loam, sand, and/or a combination of same (Spittle Claim 1 and 9); said moisture content of said mulch has a relationship to said moisture content of said soil and/or seed (Spittle Col. 1 line 9-14 and lines 29-37).

The following steps of determining moisture content of said soil and/or seed by color intensity of said mulch product; changing color intensity of said mulch product when moisture is removed from said mulch product; changing color intensity of said mulch product when moisture is added to said mulch product; adjusting moisture level of said soil and/or seed in response to said color intensity of said mulch product are a

combination of inherent physical properties and general knowledge of one of ordinary skill in the art. Dry and wet substances inherently exhibit different color intensities. It is old and notoriously well-known general knowledge of one of ordinary skill in the art that seeds and plants need water for healthy development/growth and that it is known when the area around the plant, i.e. surrounding surfaces, appear dry they need water.

Spittle teaches that the mulch increases the humidity of the soil. Thus, it is inherent that if the mulch is dry the soil is going to have dry tendencies. Spittle teaches the known relationship of mulch and soil.

Known work in one field of endeavor may prompt variations of it for use in either the same field or different one based on design incentives or other market forces if the variations are predictable to one of ordinary skill in the art.

Alternatively, Spittle teaches a mulch containing clay, but does not explicitly teach/discuss the change in color. However, Emalfarb teaches that it is general knowledge of one of ordinary skill in the art that clay is a known moisture content indicator for growing medium and that clay changes color intensity when it gets dry and wet, i.e. fades and changes (Emalfarb Col.3 line 29-30, 58; Col. 2 line 10, 41-43).

Emalfarb teaches the general knowledge that maintenance, i.e. addition of water, of moisture content is key to healthy growth (Emalfarb Col. 1 line 10-15). Emalfarb is cited as a reference of the general knowledge of one of ordinary skill in the art to recognize that when a material changes color, e.g. darkens, water is sufficiently present and when the color is faded additional water adjustments are necessary. Emalfarb is a known teaching of utilizing inherent color changing properties of a material to identify the

moisture content for healthy plant growth. It would have been obvious to one of ordinary skill in the art modify the teachings of Spittle with the teachings of Emalfarb at the time of the invention since the modification is merely the application of a known technique to a known device ready for improvements to yield predictable results.

Spittle teaches seeds (Spittle Col. 1 line 30 and line 10), but is silent on explicitly teaching said seed consisting essentially of grass, vegetable and/or flower seed. However, Holley teaches it is known to select flower seeds in combination with mulch applications (Holley Col. 2 line 11). It would have been obvious to one of ordinary skill in the art to modify the teachings of Spittle with the teachings of Holley at the time of the invention since the modification is merely the selection of a known alternate seed variety selected for a desired aesthetic effect. The modification is merely the simple substitution of one known element for another to obtain predictable results.

Regarding Claim 57, Spittle as modified teaches wherein said pigment and/or dye is added to said mulch product (pigment i.e. clay is added to the mulch Spittle claim 9).

Regarding Claim 58, Spittle as modified teaches wherein said mulch product further comprises NPK fortifiers (Spittle Col.2 Line 39-40).

Regarding Claim 59, Spittle as modified teaches wherein said dye comprises glycerin or water and a colorant (Spittle Col. 2 line 40; Col. 3 line 10-11; Col. 3 line 26-27) satisfies water and colorant.

Regarding Claim 60, Spittle as modified teaches producing said mulch product by an agglomeration/granulation operation (Spittle "pelletized" Col. 3 line 28; pelletizing is a known pressure agglomeration operation).

Regarding Claims 63-69, Spittle as modified teaches placing mulch and seed together on soil (Holley Col.1). It would have been obvious to one of ordinary skill in the art to further modify the teachings of Spittle with the teachings of Holley at the time of the invention so that the seed and fertilizer are uniformly distributed and evenly moistened. The modification is merely the application of a known technique to a known device ready for improvement to yield predictable results.

***Claim Rejections - 35 USC § 102/103***

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 56-70 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over U.S. Patent No. 5,235,781 to Holley in view of U.S. Patent No. 3,702,755 to Palmer.

Regarding Claims 56-70, Holley teaches a method of determining moisture content of soil and/or seed comprising: placing mulch and seed together on soil (Holley Claim 1); said seed consisting essentially of grass, vegetable and/or flower seed (Holley Col.2 line 11); said color coming from a pigment and/or dye in said mulch product (Holley Col.2 line 39); said mulch product comprising a fiber, cellulose, clay, loam, sand, and/or a combination of same (Holley Claim 1); said moisture content of said mulch has a relationship to said moisture content of said soil and/or seed (Holley Col. 1 line 11-12) (regarding claims 56 and 70 plants are inherently in the soil, applicant hasn't claimed the boundaries of the soil nor explicitly that the mulch is covering the soil).

The method steps of determining moisture content of said soil and/or seed by color intensity of said mulch product; changing color intensity of said mulch product when moisture is removed from said mulch product; changing color intensity of said mulch product when moisture is added to said mulch product; adjusting moisture level of said soil and/or seed in response to said color intensity of said mulch product are a combination of inherent physical properties and general knowledge of one of ordinary skill in the art. Dry and wet substances inherently exhibit different color intensities. It is old and notoriously well-known general knowledge of one of ordinary skill in the art that seeds and plants need water for healthy development/growth and that it is known when the area around the plant, i.e. surrounding surfaces, appear dry they need water.

Alternatively, Holley is silent on explicitly teaching determining moisture content of said soil and/or seed by color intensity of said mulch product; changing color intensity of said mulch product when moisture is removed from said mulch product; changing color intensity of said mulch product when moisture is added to said mulch product; adjusting moisture level of said soil and/or seed in response to said color intensity of said mulch product. However, Palmer teaches general knowledge of one of ordinary skill in the art that it is known to dye paper with a moisture indicating dye to prevent over and under watering as a visual indicator (Palmer Col. 2 line 57-72 and Col. 1 line 40-45). It would have been obvious to one of ordinary skill in the art to modify the teachings of Holley with the teachings of Palmer at the time of the invention since the modification is merely the selection of a known alternate dye, the simple substitution of one known element for another to obtain predictable results. Palmer also is a showing of general knowledge of one of ordinary skill in the art that it is known to utilize the darkening/change in color intensity as an indicator of soil moisture content (Palmer Col. 1 line 40-44).

Holley as modified teaches pigment and/or dye is added to said mulch product (Holley Col. 2 line 39 and Palmer Col. 2 line 63-64).

Holley as modified teaches said mulch product further comprises NPK fortifiers (Holley Claim 1 fertilizer).

Holley as modified teaches said dye comprises glycerin or water and a colorant (Palmer Col. 2 line 64-64).



Holley as modified teaches producing said mulch product by an agglomeration/granulation operation (Holley "briquetting" and abstract).

***Response to Arguments.***

Applicant's arguments filed 09 January 2012 have been fully considered but they are not persuasive.

Applicant has argued that the invention is a new use. However, this is not found persuasive because a new use has to be discovered and not merely an inherent property. The ability to change color intensity when something is wet or dry is an inherent property of the clay, wood, mud, etc. The method outlined in the claims is inherent general knowledge of one of ordinary skill in the art of plant husbandry. Anything that gets wet changes intensity, wet soil has a darker intensity than dry soil, e.g. wet wood shreds have a darker intensity than dry wood shreds, etc. The properties are known. Dry and wet substances inherently exhibit different color intensities. In addition, it is old and notoriously well-known general knowledge of one of ordinary skill in the art that seeds and plants need water for healthy development/growth and that it is known when the area around the plant i.e. surrounding surfaces appear dry they need water. The claims present a concept that has been thought about before and thus the invention is not found novel.

The rejection presented in the above paragraphs satisfies each and every limitation of the newly presented claims.

***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to ANDREA VALENTI whose telephone number is (571)272-6895. The examiner can normally be reached on 8:00am-6:30pm Mon.-Tues..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Peter M. Poon can be reached on 571-272-6891. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/Andrea M. Valenti/  
Primary Examiner, Art Unit 3643

25 June 2012